FOR ARGUMENT

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1654

PETER BRANTI, AS PUBLIC DEFENDER
OF ROCKLAND COUNTY
Petitioner

v.

AARON FINKEL AND ALAN TABAKMAN,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF OF PETITIONER

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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1. Respondents argue that there is no support in the record for Petitioner's position that Respondents serve at the pleasure of the Public Defender and their positions became vacant with the appointment of a new Public Defender. On the contrary, the testimony of James Anderson, the Personnel Officer of the County of Rockland, clearly states that those positions of Assistant Public Defender, Assistant County Attorney, part-time, and Assistant District Attorney, serve at the pleasure of the appointing authority (A. 138). Re-

spondents' unfair implication that witness Anderson is somewhat biased finds no support in the record, in fact, Judge Broderick in footnote 6 of his opinion cites the testimony of witness Anderson. James Anderson, the Personnel Director of the County of Rockland has had bipartisan support in his appointments and reappointments to office. He has a history of being unbiased in all of his dealings.

2. Respondents reliance on *Perry* v. *Sindermann* (408 U.S. 593) is misplaced. In *Perry* v. *Sindermann,* Respondent Sindermann was President of the Teacher's Association and publicly disagreed with the College Administration. There was an obvious restriction on his freedom of speech since his job was *conditioned* upon the "proper" expressions of his beliefs. This Court held in that case that lack of tenure doesn't give the government the right to vitiate your constitutional rights. In the case at bar, we dispute that there was any restrictions or conditions placed on Respondents' freedom of association or any conditioning of Respondents' employment on their doing anything.

The question is, did Petitioner Branti condition Respondents re-employment on Respondents willingness to do anything in furtherance of the principles of the Democratic Party? The answer is no. There is nothing in the record to suggest that Petitioner or the Democratic Legislators did anything to restrict Respondents' freedom of association.

The Perry case also contained a procedural due process claim in that Sindermann claimed that he was denied a hearing. The Supreme Court disagreed with the Circuit Court of Appeals that a *subjective* expectancy is protected by due process. As was stated in *Board*

of Regents v. *Roth,* 408 U.S. 564 at page 575 "it stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another". I respectfully call to the Court's attention that Respondents are lawyers with full-time law practices who used these positions to supplement their incomes.

In the Perry case, the teachers had an understanding that there was a de facto tenure program. In the case at bar, there was no such implied contract. Respondents had no *objective* expectancy of re-employment. The fact that there was a bipartisan Public Defender's Office in the past should not have given an *objective* indication to the Respondents that *they* (in lieu of others) would be continued. Respondent Finkel was present when Frank Barone became Public Defender. He saw Barone not rehire individuals from his predecessor's office. He then again saw Frank Barone replace individuals when the Legislature changed majority parties in 1974. If Finkel had an *objective* expectancy of re-employment, why did he change his registration voluntarily to Democrat? Why did he seek support of various Democratic leaders? We believe therefore that the Perry case is inapplicable. The Respondents clearly did not show a loss of constitutional rights and they did not show an *objective* expectancy of re-employment.

3. Respondents would have this Court believe that they were political novices. On the contrary, the record shows that both Respondents were politically active and attempted to be reappointed through the political system and if successful they never would have been concerned about the constitutional rights of the other attorneys who were not appointed. Respondents seemed to imply at page 11 of their brief that there is some-

thing insidious about appointing members of your own political party to positions of public trust. If in fact there is something wrong with that system, then the appointment process used for appointments to the Federal Judiciary is as insidious. We don't believe either system is insidious. The ultimate criteria is qualification for the job. There were many qualified Democratic and Republican lawyers, but there were only nine jobs. Would Respondents have made the selection process a lottery? Branti testified that he was surprised that Republican Minority Leader Grogan didn't approach him since Branti was prepared to consider Republicans. In fact, he asked Republican Legislator Dusanenko about an individual who Branti thought was a Republican and was rebuffed by Dusanenko who *only wanted* Tabakman (A. 161, 169-170).

4. Respondents' attempt to persuade this Court that they are mere office boys flies in the face of *their own* description of their jobs as "quasi fiduciary". We submit that these "quasi fiduciary" jobs are policymaking and confidential. They were described as such by the Personnel Director of the County and can in no way be compared with such non-fiduciary positions as janitors, elevator operators, clerks and the like. At page 15 of their brief, Respondents described the Personnel Officer's testimony that typifies such confidential relationships. However, the Personnel Officer as is seen in the record, placed the various attorney positions of the County of Rockland in the very same class of employment (A. 137). That class of exempt employees numbered under fifty out of two thousand county employees (A. 135-136).

5. Respondents argue that there is no conflict in the Circuits since the holding in *Ramey* v. *Harber,* 589

F.2d 753 (CA 4) cert. den. —— U.S. ——, 61 L.Ed.2d 275, is solely on the issue of retroactivity. We will concede that the Circuit Court's holding in that case was solely on the issue of retroactivity. However, in our brief, we compared the Fourth Circuit's reasoning on the Elrod issues to the facts and issues in this case. Additionally, Judge Hall of the Circuit Court did not *dissent* as is set forth in Respondents' brief, he *concurred* and he concurred quite emphatically that the Elrod issues were not present regardless of retroactivity. We argue similarly.

6. Finally we come to what must be the most important issue in this case. Whether political sponsorship alone is in and of itself a breach of the Constitution. Respondents obviously believe that it is just as insidious to sponsor somebody as to politically coerce them. We believe as we have fully set forth in our brief, that political sponsorship alone does not offend the Constitution, such as would require a compelling state interest to legitimatize it. But if it was unconstitutional, we did, in our brief, show a compelling state interest.

Respondents' argument that by not giving Respondents the opportunity to succumb to political pressures is more offensive to the Constitution than political coercion is specious, riduculous and does not deserve further ink. Respondents were not considered for reappointment by Branti and the political majority. Legislative Chairman Sam Colman's testimony regarding Finkel and the former Public Defender Office's reputation in his community is significant in this regard (A. 324-326). But despite this cold shoulder from every one involved in the process of appointment, the Respondents persisted in using all of their political contacts,

real or imagined, (including in Finkel's case, his voluntary change of registration), to ingratiate themselves with the political party in power. They were unsuccessful, so they stamped their feet, yelled like children and said that if they weren't successful playing by the rules, they would go to Federal Court and change the rules.

Despite arguments to the contrary, the affirmance of this case by applying the Elrod rule to attorneys where there is mere sponsorship and no political coercion, certainly would, for all practical purposes, eliminate all forms of political patronage.

CONCLUSION

For the reasons stated in both petitioner's brief and petitioner's reply brief, the judgments below should be reversed.

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